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No. 93-1153

In The

Supreme Court of the United States

October Term, 1993

JERRY N. MIXON, M.D.,

Petitioner,

v.

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

STATE OF IDAHO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals correctly applied Rule 77(d) of the Federal Rules of Civil Procedure and Rule 4(a) of the Federal Rules of Appellate Procedure in originally dismissing Petitioner's Appeal. (See Appendix E).

2. Whether, in light of Petitioner's arguments and affidavits filed in the First Appeal to the Ninth Circuit Court of Appeals, that court properly ruled on the availability of relief under Fed. R. Civ. P. 60(b) and thereafter applied the doctrine of law of the case. (See Appendix H).

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The "State of Idaho Respondents" referred to herein includes the Idaho Department of Law Enforcement, Jim Jones, Marc Haws, Scott Birch, and Jon Olmsted. The State of Idaho Respondents concur with the Petitioner's description of the parties as set forth in the Petition and subsequently clarified by Respondents Gunnell and Schvaneveldt.

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No. 93-115

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JERRY N. MIXON, M.D.,

Petitioner,

v.

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF IDAHO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The State of Idaho Respondents concur with the description of the opinions below set forth in the Brief in Opposition to Petition for a Writ of Certiorari filed by Respondents Gunnell and Schvaneveldt.

JURISDICTION

The State of Idaho Respondents concur with Petitioner's Statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State of Idaho Respondents concur with the Respondents Gunnell's and Schvaneveldt's Statement of "Constitutional and Statutory Provisions," however, would note that this case involves the application of Fed. R. App. P. 4(a) prior to the 1991 amendments which added subsection (a)(6) to that Rule.

STATEMENT OF THE CASE

The State of Idaho Respondents concur with the Statement of the Case set forth in Respondents Gunnell's and Schvaneveldt's Brief in Opposition to Petition for A Writ of Certiorari.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS WARRANTING A WRIT OF CERTIORARI

Although not containing an exhaustive list of the reasons which justify granting a Writ of Certiorari,

Supreme Court Rule 10 provides the basic framework within which to analyze the Petitioner's request. Supreme Court Rule 10 states in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

SUP. CT. R. 10.1(a).

The State of Idaho Respondents respectfully submit that the instant petition does *not* involve a decision of the Ninth Circuit Court of Appeals which (1) conflicts with the decision of another United States court of appeals on the same matter; (2) nor does the petition present a decision of the Ninth Circuit on a federal question in conflict with the Idaho Supreme Court; and finally, (3) the Ninth Circuit in its opinions below, did not depart from the accepted and usual course of judicial proceedings or sanction the departure by a lower court sufficient to merit exercise of this Court's power of supervision. In short,

the State of Idaho Respondents respectfully submit that there are no compelling reasons on which to base the issuance of Writ of Certiorari. As demonstrated below, because of the factual and procedural history of this case, along with changes to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure, any ruling by this Court other than denial of Petitioner's Writ, would be of no precedential value.

II.

THE NINTH CIRCUIT CORRECTLY APPLIED THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF APPELLATE PROCEDURE AS WELL AS APPLICABLE NINTH CIRCUIT PRECEDENT.

At the time judgment was originally entered in this matter, October 31, 1990, Rule 77(d) of the Federal Rules of Civil Procedure read as follows:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appeal, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.*

Fed. R. Civ. P. 77(d). (emphasis added).

Correspondingly, Rule 4(b) of the Federal Rules of Appellate Procedure, did not provide relief for parties who were not served with a judgment, and Ninth Circuit precedent was clear that counsel had a duty to stay informed as to the status of pending dispositive motions. *Alaska Limestone v. Hodel*, 799 F.2d 1409 (9th Cir. 1986); *Kramer v. American Postal Workers Union, AFLCIO*, 556 F.2d 926 (9th Cir. 1977). Thus, under the then-extant Federal Rules, counsel had an affirmative duty to stay abreast of the Court's rulings on dispositive motions, and failure to receive the Court's orders or judgments from the clerk of the court did not toll the running of deadlines in which to file a Notice of Appeal.

In dismissing Petitioner's first appeal, the Ninth Circuit correctly ruled that failure to receive the judgment from the clerk's office was not grounds for relief under Fed. R. Civ. P. Rule 60(a), citing *Waggoner v. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (Per Curiam).

In December of 1991, one year after the judgment was originally entered by the District Court, Rule 4(a)(6) was added to the Federal Rules of Appellate Procedure. Correspondingly, Fed. R. Civ. P. 77(d) was also amended. As amended, Fed. R. App. P. 4(a)(6) reads:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of

> such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Rule 4(a)(6), Fed. R. App. P. (1991).

By Petitioner's appeals to the Ninth Circuit and the instant Petition, Petitioner attempts to "bootstrap" this case into the 1991 amendments to the Federal Rules. Petitioner seeks to have this Court retroactively apply the amended rules. Even applying the present Federal Rules of Appellate Procedure, however, Petitioner would not prevail.

The State of Idaho Respondents respectfully assert that the facts and procedural history of this case do not merit a Writ of Certiorari. Indeed, the facts of this case viewed in light of the 1991 amendments to Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6) make it virtually impossible for this case to be of any precedential value. This Court has repeatedly held that issuance of a Writ of Certiorari is appropriate only to resolve matters of public concern as distinguished from cases of importance to only the parties. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S. Ct. 453 (1951); *Layne and Company v. Western Well Works*, 261 U.S. 387, 67 L.Ed. 712, 43 S. Ct. 422 (1922).

III.

THE NINTH CIRCUIT CORRECTLY DENIED MIXON'S RELIEF UNDER RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioner's Statement of the Case seemingly glosses over the fact that in the first appeal to the Ninth Circuit, Petitioner argued entitlement to relief under Fed. R. Civ. P. 60(b). In the Petition at page 5, Petitioner states:

> Even though no Rule 60(b) motion had been filed by the Mixons, heard by the district court nor evidence presented in that court concerning entitlement to such relief, the motions panel concluded in its final paragraph:
>
> > "Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' Sept. 5, 1990 motion to amend judgment. Thus, under the test set forth in *Rogers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b)."
>
> This decision was wholly dicta and made without the benefit of a trial court review of any Rule 60(b) motion, without a complete factual record and further misstated the ruling of the district court.

Petition for Writ of Certiorari; p. 5.

Petitioner then asserts that the Ninth Circuit's ruling was therefore dicta and thus could not possibly be the basis for the application of the doctrine of law of the case. Reading Petitioner's Statement of the Case gives the impression that the Ninth Circuit's opinion as to the

inapplicability of Fed. R. Civ. P. 60(b) was whimsically included only to address the district court's reference below to the "diligence" of counsel. What Petitioner fails to acknowledge, however, is that the application of Fed. R. Civ. P. 60(b) was urged both in their briefing to the Ninth Circuit in the first appeal (Appendix K) and in the factual affidavit filed by Petitioner's counsel in the first appeal (Appendix J). Thus, the opinion of the Ninth Circuit in the first appeal was most certainly not rendered in a vacuum, and Petitioner's premise is flawed.

Upon the dismissal of the first appeal (Appendix E), and after denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* (Appendix F), the Petitioner returned to the district court armed with the same facts presented to the Ninth Circuit (Appendix J). Despite the opinion of the Ninth Circuit Court of Appeals, that Fed. R. Civ. P. 60(b) did not apply, the district court granted Petitioner's relief (Appendix G).

In the second appeal, the Ninth Circuit again reversed the district court and dismissed the appeal. The Court correctly held that the court's prior opinion in the first appeal (Appendix E) constituted law of the case and therefore reversed the district court. (See Appendix H). Viewed in whole, it appears the Petitioner invited the Court of Appeals to rule on the application of Fed. R. Civ. P. 60(b) relief, provided that court with a factual background with which to analyze Fed. R. Civ. P. 60(b) relief, and then claimed foul when the court adversely ruled. Clearly, this Court should not continence such actions. The procedural and factual history of this case evidence that the doctrine of law of the case was appropriately applied in the disposition of the second appeal.

Finally, this Petition presents a factual setting remarkably similar to (however, much less compelling than) the case of *James v. United States*, 459 U.S. 1044 (1982), which was also on Petition to this Court from the Ninth Circuit Court of Appeals. The facts in *James*, related to the application of Fed. R. App. P. 4 with the criminal counterpart to Fed. R. Civ. P. 77(d), i.e., Fed. R. Crim. P. 49(c).

In *James*, Justice Brennan joined by Justice Blackmun wrote in support of the denial of certiorari. Petitioner in *James* filed a timely motion for reduction of sentence pursuant to Fed. R. Crim. P. 35, which was denied by the court. Petitioner did not receive notice of the denial from the Clerk of the District Court. Several months later, the Petitioner learned of the District Court's denial, and timely moved to appeal out of time which was granted by the District Court. The Ninth Circuit determined, however, *sua sponte* that Fed. R. App. P. 4 did not allow additional time to appeal. In the opinion denying certiorari, Justice Brennan noted that civil petitioners had the potential for relief under Fed. R. Civ. P. 60(b) and criminal petitioners could apply for a writ of *coram nobis*.

As demonstrated above, as well as in the opinions of the Court of Appeals, Petitioner sought Fed. R. Civ. P. 60(b) relief, which was appropriately denied. The State of Idaho Respondents urge that the Court should deny the Petition for a Writ of Certiorari. The State of Idaho Respondents concur with the arguments and points and authorities presented by Respondents Gunnell and Schvaneveldt and submit that this case does not present

the proper factual, procedural or legal issues on which a Writ of Certiorari should issue.

IV.

CONCLUSION

State of Idaho Respondents concur with the Gunnell and Schvaneveldt Respondents, that the Petition should not even reach the Court's "discussion list," as the issues presented clearly are not of public concern. The amendments to the Federal Rules of Civil Procedure and Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure have settled the issues raised by the Petition. The State of Idaho Respondents respectfully submit that a grant of Petitioner's Writ would be improvident.

Respectfully submitted this 4th day of March, 1994.

HOLDEN, KIDWELL, HAHN & CRAPO
JOHN G. SIMMONDS, Of the Firm
Attorneys for The State of Idaho Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 MEMORANDUM DECISION
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and individual, Defendants.	(Filed JAN 19 1990) Civil No. 88-3086

The Court has before it motions for summary judgment filed by defendants Eudean Gunnell; Gary Schvandeveldt; TWI, Inc.; Robert G. Mangini; Jim Jones; Marc Haws; State of Idaho, Department of Law Enforcement; John Ohmsted; and Scott Birch. In addition, the Court has before it a motion to strike the affidavit of Leigh Nash.

The Court has heard oral argument on the motions and they are ready to be resolved. The Court must determine whether there exist any genuine issues of material fact. *See* Fed.R.Civ.P. 56(c).

In 1981, the plaintiff, Dr. Jerry N. Mixon, and his wife were living in Preston, Idaho, where Dr. Mixon practiced medicine at the Franklin County Medical Center. Dr. Mixon alleges that his hospital privileges were suspended on October 16, 1985, by the hospital's board of trustees in conspiracy with the Franklin County Commissioners and others because Dr. Mixon had criticized a powerful member of the community, Dr. Boyd Hale. Dr. Mixon responded to the suspension of his privileges by filing a tort claim alleging that the disciplinary action taken against him violated his constitutional rights. On February 28, 1986, Dr. Mixon moved from his home in Preston to the State of Washington. Three days later, on March 3, 1986, Dr. Mixon's home in Preston burned to the ground.

Dr. Mixon had his homeowner's insurance with Farmers Insurance Company of Idaho (Farmers). Farmers hired TWI, Inc., and Robert Mangini to investigate the blaze. The report of Investigator Mangini, filed March 31, 1986, observed that the fire was very fast and intense for a residence with no combustible contents. The heat generated by the fire indicated that petroleum products were involved. In addition, the investigators found empty fuel cans that were supposed to be full, and the remnants of a plastic container smelling of diesel fuel. The report concluded that the fire "was not an accident and was deliberately set." *Id.* at p.8. A later forensic report indicated that diesel fuel was one of the accelerants present at the site.

The Franklin County Sheriff, Eudean Gunnell, appointed his deputy, Gary Schvaneveldt, to investigate the fire for the Sheriff's Office. Other investigators were Scott Birch and John Ohmsted for the State of Idaho, Department of Law Enforcement. Deputy Schvaneveldt talked with these investigators and interviewed fifty-eight individuals. In early April 1986, he met with Franklin County Prosecutors Jay McKenzie and Ron Mumford as well as Marc Haws who was the Deputy State Attorney General advising the local prosecutors on how the matter should be handled.

During his investigation, Deputy Schvaneveldt learned facts which led him to believe that Dr. Mixon and a friend – Stephan Douglas – had committed arson. Dr. Mixon had told Deputy Schvaneveldt that his income had recently suffered a "devastating" drop due to the suspension of his hospital privileges. A clerk at an Army surplus store in Logan, Utah, stated that he had seen Dr. Mixon in the store on February 28, 1986. Dr. Mixon had placed one package of Trioxane fuel and a camouflage (face-paint) stick on the counter. The clerk, who lived in Preston, recognized Dr. Mixon but did not know if Dr. Mixon recognized him. The clerk had to answer a telephone before waiting on Dr. Mixon, and Dr. Mixon left the store, leaving the items behind on the counter. Also on February 28, 1986, Dr. Mixon met with Mr. and Mrs. Douglas Bliss to sell the Mixon home. Dr. Mixon executed an earnest money agreement but his wife did not sign it. Also, Dr. Mixon left without the earnest money. Deputy Schvaneveldt concluded that this might have been a sham sale designed to throw the authorities off the trail, to

make it appear that Dr. Mixon had no motive for arson, having sold the house.

Immediately after the fire, Sheriff Gunnell and the Franklin County Fire Chief visited the home of Dr. Mixon's close friend, Stephan Douglas. Douglas appeared nervous and acted unusual. Dr. Mixon later gave a statement to investigators that Douglas was a "crazy friend" who was "capable of" burning down the house. In fact, Dr. Mixon and Douglas had jokingly discussed burning down the house in the past. Both Dr. Mixon and Douglas told investigators that Douglas did not have a key to Dr. Mixon's residence, but a later search of Douglas' residence revealed two such keys.

Douglas also told investigators that he had not purchased diesel fuel before the fire, and had no diesel equipment. But a Preston gas station manager recognized Douglas as having purchased diesel fuel in a plastic container sometime between February 24, 1986, and March 1, 1986.

The fire occurred in the early morning hours of March 3, 1986. Sheriff Gunnell had notified Stephan Douglas at about 2 a.m. on the morning of March 3, 1986, that the Mixon home was burned, although he did not indicate to Douglas that arson was suspected. Douglas attempted to contact Mixon by telephone but was unsuccessful. Discovering that Mixon was staying at a motel in Shelton, Washington, Douglas called the Shelton Police Department and requested that its officers notify Dr. Mixon to call Douglas. Officers were dispatched to inform Dr. Mixon to call Douglas. The officer who completed this task filed his statement that he specifically

recalls not telling Dr. Mixon anything about the house burning down because the officer thought it better that Dr. Mixon hear the bad news from someone that Dr. Mixon was familiar with. Instead, the Shelton police officer simply told Dr. Mixon to call Douglas.

Telephone records from the motel show that Dr. Mixon called Douglas first, then called the Franklin County Sheriff's Office and a neighbor. In a statement given by Dr. Mixon, he indicated that he had first called a neighbor and the Franklin County Sheriff's Office before he called Douglas. Dr. Mixon also stated that he began the conversation with Douglas by asking, "Steve, I heard we had a bad fire," to which Douglas replied that the police were just at his door and somebody had burned the house down. Deputy Schvaneveldt felt Dr. Mixon's credibility was weakened by the phone records, and wondered how Dr. Mixon knew about the fire before being notified by anyone.

Deputy Schvaneveldt also investigated Dr. Hale, the Bliss family, the Franklin County Commissioners, and the hospital administration. He presented all of his information to Prosecutors McKenzie and Mumford.

In June 1986, Marc Haws, a Deputy State Attorney General, was appointed to assist the local prosecutors. A criminal complaint was prepared by the prosecutors charging Dr. Mixon with conspiring with Stephan Douglas to commit arson. A probable cause hearing was held before Judge Willis Ward on July 17, 1986. At the conclusion of that hearing, Judge Ward issued an arrest warrant for Dr. Mixon and bond was set at $75,000. Dr. Mixon was arrested that same day, posted bond, and was released.

A preliminary hearing was held on July 3, 1986, before Judge Garth Pincock. At the conclusion of that hearing, all charges against Dr. Mixon were dropped. Dr. Mixon then filed this § 1983 action against the individuals and entities responsible for his loss of hospital privileges and arson charge. His basic claim is that the defendants conspired together to deprive him of his constitutional rights.

The Court now turns to the pending motion for summary judgment filed by Deputy Schvaneveldt and Sheriff Gunnell. Dr. Mixon's claim against these two defendants is that they selectively presented evidence to Judge Ward to obtain a criminal charge which could be used as leverage to convince Dr. Mixon to drop his tort claim against the county. In support, Dr. Mixon filed the affidavit of Leigh Nash, a retired police officer and fire investigator. Nash concludes that the investigation was biased against Dr. Mixon for a number of reasons. First, Nash points out that evidence that Stephan Douglas' car was cold and apparently unused in the early morning of March 3, 1986, was never revealed to Judge Ward during the probable cause hearing. In addition, Deputy Schvaneveldt did not reveal in his summary, that the Preston gas station manager had indicated uncertainty as to whether Douglas bought diesel there on February 28, 1986, or March 1, 1986. Nash also found suspicious Deputy Schvaneveldt's failure to pursue more intently Dr. Hale who had at one time threatened to shoot Dr. Mixon and burn his house down. Likewise, Deputy Schvaneveldt did not, in Nash's opinion, investigate adequately the Bliss family who had no checking account and presumably could not obtain financing, and thus had

a financial motive to burn down the house to obtain insurance benefits. Nash also objected to Deputy Schvaneveldt's characterization of Dr. Mixon as being in financial distress, as Nash felt that Dr. Mixon had "repeatedly told all the investigative officers . . . that they [the Mixons] were not in financial distress." Affidavit of Nash at p.7, ¶ 6(d). Nash concludes that an objective study of the evidence would reveal that no probable cause existed to issue an arrest warrant.

The defendants seek to strike the Nash affidavit, but even if the affidavit is examined, it compels no conclusion prejudicial to defendants. All the information Nash had was in the possession of the prosecuting attorneys. It is undisputed that Deputy Schvaneveldt and Sheriff Gunnell turned over all their investigative material to the prosecutors. Thus, the prosecutors knew, as did Nash, that the investigating officers: (1) did not lift fingerprints off the keys found in the Douglas home; (2) did not pursue more intently Dr. Hale or the Bliss family; (3) discovered a cold engine in Stephan Douglas' car on March 3, 1986; (4) knew that the Preston gas station manager was unsure whether Douglas bought Diesel on February 28 or March 1, 1986, and that the gas container was white, not red; and (5) knew all about Dr. Mixon's assertions regarding his financial condition. In short, while there are allegations that Deputy Schvaneveldt and Sheriff Gunnell conducted a negligent investigation, there is no evidence that they withheld material from the prosecutors or unduly pressured the prosecutors to draft a criminal complaint.

In the Ninth Circuit, a negligent investigation by police officers does not necessarily overcome the presumption that the prosecutor independently exercised his official duty in instituting the prosecution. *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986), *modified*, 811 F.2d 504 (1987) (sentence awarding attorneys fees and costs deleted). Under *Smiddy*, the plaintiff had the burden of showing that the prosecuting attorney was subjected to "unreasonable pressure" by the police officers or that the officers knowingly withheld relevant information with the intent to harm the accused." *Id.* at 1471. Unless overcome, the presumption that the prosecutor independently exercised his judgment regarding the existence of probable cause for filing the complaint insulates the arresting officers from liability. *Id.* at 1471. There is no evidence in the present case to overcome this presumption. The officers did not unduly pressure the prosecutors and turned over all information to them.

Dr. Mixon has also sued Deputy Schvaneveldt and Sheriff Gunnell for malicious prosecution. Under Idaho law, an individual who goes forward with a criminal complaint upon the advice of counsel is entitled to a defense to a malicious prosecution claim so long as there has been a full and fair disclosure. *Powers v. Country Kitchen International*, 99 Idaho 259, 580 P.2d 862 (1978). As just discussed, the prosecutors made the decision to file the criminal complaint after full and fair disclosure, and thus the malicious prosecution claim must be dismissed.

Finally, these two defendants have been sued for false imprisonment. The alleged "false arrest" occurred on July 17, 1986, but Dr. Mixon did not file his tort claim until February 26, 1987. Idaho Code § 6-906 requires that

all tort claims be filed 180 days from the date the claim arose or reasonably should have been discovered, whichever is later. In this case, Dr. Mixon had all the facts necessary for the filing of his claim on July 17, 1986, and thus the false imprisonment charge should be dismissed. Finally, all the claims of Mrs. Mixon shall be dismissed as against these two defendants as her claims are simply derivative of her husband's. The motions for summary judgment by Deputy Schvaneveldt and Sheriff Gunnell must therefore be granted.

The Court turns next to the motion for summary judgment filed by defendants TWI, Inc., and Robert Mangini. These defendants were involved in the fire investigation for Farmers. The plaintiffs allege that these defendants conspired with Deputy Schvaneveldt and Sheriff Gunnell and are therefore acting under "color of law" for purposes of § 1983. What effect does the dismissal of Deputy Schvaneveldt and Sheriff Gunnell have on the private investigators? The United States Supreme Court has held that private individuals conspiring with a judge cannot be cloaked with the same absolute judicial immunity enjoyed by the judge. *Dennis v. Sparks,* 449 U.S. 24 (1980). On the other hand, the high court has left open the possibility that under other circumstances, private parties may be allowed to invoke the doctrine of qualified immunity when those they allegedly acted in conspiracy with can claim qualified immunity. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 942, n.23 (1982); *see also Buller v. Buechler,* 706 F.2d 844, 851 (8th Cir. 1983). In *Smiddy,* the Ninth Circuit reasoned that the prosecutor's action in issuing the complaint breaks the chain of causation thereby insulating the arresting officers from liability

unless those officers used undue coercion or failed to divulge relevant investigative information with the intent to harm the accused. If the chain of causation is broken thereby insulating the arresting officers, the same reasoning would insulate from liability private investigative officers. The lack of causation defense does not depend on one's official employment status; it is a defense available to private and public entities. The Court therefore finds the defense applicable to TWI, Inc., and Mangini, and will dismiss the § 1983 claim against them.

TWI, Inc., and Mangini have also sought to dismiss the negligence claim against them on the ground that they owed no duty of care to Dr. Mixon. These defendants argue that they had no contract with Dr. Mixon and that their sole contractual relationship was with Farmers to do an arson investigation.

In Idaho one owes a duty to every person to use reasonable care to avoid injury to the other person in any situation where it is foreseeable that a failure to use due care might result in injury. *Gibson v. Hardy*, 109 Idaho 247, 706 P.2d 1358 (Idaho Ct.App. 1985). In the present case, TWI, Inc., and Mangini conducted an arson investigation for Farmers of Farmers' insureds. There are questions of fact concerning whether TWI, Inc., and Mangini should have foreseen that any lack of due care in their investigation could have harmed the insureds. The lack of contractual relationship between these defendants and Dr. Mixon is of no relevance. *See Stephens v. Stearns*, 106 Idaho 249, 678 P.2d 41 (1984). The Court will therefore grant in part the motion for summary judgment filed by TWI, Inc., and Mangini and will dismiss the claim brought against them under 42 U.S.C. § 1983. The remainder of the motion for

summary judgment will be denied at this time without prejudice to the right of these defendants to raise a new motion on different grounds.

The Court turns next to the motion for summary judgment filed by defendant Marc Haws. Defendant Haws seeks dismissal first on the ground of prosecutorial immunity. The plaintiffs respond by arguing that "clearly Haws is not protected by absolute immunity prior to the filing of the charge in mid-July. He enjoys, at best, qualified immunity during his evaluation stage of the process conducted prior to the formal filing." *See* Dr. Mixon's Brief filed August 15, 1989, at p.8. Dr. Mixon recognizes that the law of the Ninth Circuit might be different, but urges this Court to adopt a Second Circuit case, *Barbera v. Smith*, 836 F.2d 96 (2nd Cir. 1987). This Court is bound, however, by Ninth Circuit authority. Recently, the Ninth Circuit has reaffirmed its position that a prosecuting attorney's investigative and administrative functions carried out in preparation of his case are entitled to absolute immunity. *Schlegel v. Bebout*, 841 F.2d 937 (9th Cir. 1988). The allegations against Haws concern investigative and administrative matters carried out as he prepared this case and are absolutely immune from attack.

Haws should be dismissed for another reason. The United States Supreme Court has recently held that neither a state nor its officials acting in their official capacities were "persons" under § 1983. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304 (1989). All the allegations against Haws essentially challenge his activities in his official capacity as a deputy state attorney general.

The Court shall therefore dismiss the § 1983 claim against Haws. The *Will* case also compels the Court to dismiss the § 1983 claim against the other state defendants (Jim Jones; State of Idaho, Department of Law Enforcement; John Ohmsted, and Scott Birch) as the allegations against these defendants all arise from conduct in their official capacity.

These state defendants have also been sued for malicious prosecution and false imprisonment. Attorney General Jim Jones and the Idaho Department of Law Enforcement are being sued solely on a *respondeat superior* basis and must be dismissed from this case. Indeed, during the oral argument Dr. Mixon's counsel agreed that Attorney General Jim Jones should be dismissed from the case. Ohmsted and Birch are not prosecutors and had nothing to do with the false imprisonment claim and thus must also be dismissed. With regard to the remaining claims of malicious prosecution and false arrest against defendant Haws, Dr. Mixon has requested additional time to conduct further discovery. The Court believes that these remaining claims are very weak, but finds that Dr. Mixon is entitled to further discovery and will order that all discovery with regard to defendant Haws be completed within forty-five (45) days from the date of this order.

DATED this 19th day of January, 1990.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 ORDER
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and individual, Defendants.	(Filed JAN 19 1990) Civil No. 88-3086

The Court has examined the entire record concerning the motions for summary judgment filed by the various defendants. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that the motions for summary judgment filed by defendants

Eudean Gunnell and Gary Schvaneveldt be, and the same are hereby, GRANTED, and that these two defendants be, and they are hereby, DISMISSED, from the above-entitled action.

IT IS FURTHER ORDERED that the motion for summary judgment filed by defendants TWI, Inc., and Robert G. Mangini be, and the same is hereby, GRANTED IN PART and DENIED IN PART and that the claim against TWI, Inc., and Robert G. Mangini under 42 U.S.C. § 1983 be, and the same is hereby, DISMISSED, and that the remainder of the motion for summary judgment be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that the motion for summary judgment filed by defendants Jim Jones; State of Idaho, Department of Law Enforcement; John Ohmsted; and Scott Birch be, and the same is hereby, GRANTED and that defendants Jim Jones; State of Idaho, Department of Law Enforcement; John Ohmsted; and Scott Birch be, and they are hereby, DISMISSED, from the above-entitled action.

IT IS FURTHER ORDERED that the motion for summary judgment of defendant Marc Haws be, and the same is hereby, GRANTED IN PART and RESERVED IN PART, and that the claim against defendant Marc Haws under 42 U.S.C. § 1983 be, and the same is hereby, DISMISSED, and that the remainder of the motion for summary judgment be, and the same is hereby, RESERVED, pending the outcome of further discovery.

IT IS FURTHER ORDERED that all discovery against defendant Marc Haws be completed on or before forty-five (45) days from the date of this order.

IT IS FURTHER ORDERED that the motion to strike affidavit of Leigh Nash be, and the same is hereby, DENIED.

DATED this 19th day of January, 1990.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 JUDGMENT AND RULE 54(b) CERTIFICATION
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and individual, Defendants.	(Filed AUG 27 1990) Civil No. 88-3086

The Court has before it a motion for reconsideration and a motion to certify its memorandum decision and order dated January 19, 1990, as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Court, having looked at the record as a

whole, determines that the motions are ready to be resolved.

Pursuant to Rule 54(b) the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims. In looking at the Rule 54(b) motion before it, the Court expressly finds that there is no just reason for delay in certifying its memorandum decision and order of January 19, 1990, as a final judgment. The Court can find no extenuating circumstances that lead it to a contrary determination and believes that an interlocutory appeal will further the administration and orderly resolution of the litigation in this matter.

This is not an ordinarily 42 U.S.C. § 1983 action; its complexity and potential trial length leads this Court to believe that it would be unfair for the plaintiffs to proceed to trial without the dismissed defendants and later have the memorandum decision and order reversed and have to proceed to trial again. Therefore, this Court's memorandum decision and order dated January 19, 1990, will be certified as a final judgment.

Plaintiffs have also requested this Court to reconsider its memorandum decision and order. Plaintiffs assert two grounds in support of their motion, the first being that plaintiffs have been denied adequate discovery, and second, that the Court overlooked certain facts and arguments plaintiffs advanced.

The Court finds that the plaintiffs have been granted and have engaged in extensive discovery in this matter. Despite this discovery the plaintiffs have failed, and continue to fail, to bring to the attention of this court any facts that would lead the Court to reconsider its decision.

All facts and arguments that plaintiffs have set forth in their pleadings have been considered and the Court can find no basis for granting plaintiffs' motion for reconsideration.

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiffs' motion for certification of this Court's decision filed January 19, 1990, as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion for reconsideration of this Court's memorandum decision and order of January 19, 1990, be, and the same is hereby, DENIED.

DATED this 27th day of August, 1990.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED
STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Defendants.

Civil No. 87-4134

MEMORANDUM DECISION

JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and individual,

Defendants.

(Filed OCT 31 1990)

Civil No. 88-3086

The Court has before it plaintiffs' motion to alter or amend judgment under Rule 59(e) and defendant Farmers Insurance Company of Idaho's (Farmers') motion for summary judgment. In considering a motion for summary judgment, the Court must determine

whether there exist any genuine issues of material fact. *See* Fed.R.Civ.P. 56(c).

The Court will turn first to Farmers' motion for summary judgment. The facts of this matter have been set forth fully in the Court's memorandum decision filed January 19, 1990, and will not be repeated here but simply incorporated by reference. Defendant Farmers and the Mixons settled their dispute in this matter when Farmers paid to the Mixons compensation pursuant to the terms of the insurance policy and the Mixons signed a release of claims. That release provided that the Mixons released "all claims, causes of action, damages, and expenses whatsoever which have resulted or may hereafter result from the incident described in the noted lawsuit, namely a fire which occurred at the residence of Mixon in Preston, Idaho, on March 3, 1986."

The release goes on to provide that Farmers and the Mixons agree to "a complete compromise and settlement of the claims against Mixon in the lawsuit noted above, as well as any other claims arising in any way or in connection with the subject of the lawsuit noted above, including any permissive or compulsory counterclaims which might have been filed by Mixons in the above lawsuit, under the homeowner's policy."

The language of the release clearly protects Farmers from all claims brought by the Mixons in this case. In response, the Mixons argue that the Court should examine material outside the language of the release. Specifically, the Mixons assert that it was not their intent to release claims that Farmers negligently conducted the fire investigation.

The law in Idaho is well-established that where the language of the release is clear and unambiguous, the Court should go no further than the four corners of the release itself. *Tapper v. Idaho Irrigation Co.*, 36 Idaho 78, 210 P. 591 (1922); *Yellowstone Pipe Line Co. v. Kuczynski*, 283 F.2d 415 (9th Cir. 1960). In this case, the terms of the release are clear and unambiguous and plainly provide that the Mixons have released Farmers from liability for the very claims that they assert in this lawsuit.

The Court shall therefore grant the motion for summary judgment filed by Farmers.

The Court turns next to the Rule 59(e) motion filed by plaintiffs. By this motion, the Mixons seek reconsideration of our January 19, 1990, order dismissing defendants Gunnell and Schvaneveldt. Plaintiff argues that there are questions of fact under *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986), *modified* 811 F.2d 504 (9th Cir. 1987), as to whether these defendants knowingly withheld relevant information from prosecutor Mark Haws with an intent to harm the plaintiffs. More specifically, plaintiffs claim that Gunnel and Schvaneveldt withheld four items of evidence not previously discussed by the Court in its January 19, 1990, memorandum decision. Plaintiffs argue that the following four pieces of information were withheld from Prosecutor Haws: (1) that a red gasoline container had been moved to Shelton, Washington, with the Mixon family and thus could not have been used by the arsonist; (2) that Dr. Hale had sent a copy of Dr. Mixon's tort claim to officials in Shelton, Washington; (3) that Dr. Grover had filed a written statement stating that he had heard Dr. Hale threaten to burn down the Mixon home; and (4) that the tire tracks and

footprints in the snow had never been matched to an innocent bystander and, in fact, had never been matched to anyone.

The Court turns first to the red gas can allegation. Prosecutor Haws testified that his knowledge at the time he decided to charge Dr. Mixon was not much different from his knowledge at the time of the preliminary hearing. He does not think he was aware of the fact that the red [gas] can was actually in Shelton, Washington, at the time [of the] arson fire. He also testified that the gas cans were generally an important part of the case but that he could not remember why.

While the evidence concerning gas cans may have been important, the location of the *red* gas can appears insignificant. There was no evidence introduced by the prosecution at the probable cause hearing concerning the red gas can. In addition, the state magistrate's detailed review of the evidence detrimental to Dr. Mixon introduced during the preliminary hearing is devoid of any discussion of the red gas can. If the prosecution did not think it was important enough to pursue at the probable cause hearing or the preliminary hearing, there is little likelihood that it was relevant to Haws' decision to charge the plaintiff. The second item of information Haws was allegedly unfamiliar with is Dr. Hale's mailing of the Mixons' tort claim to officials in Shelton, Washington. In his deposition testimony, Haws cannot recollect whether he knew of this information or not. Haws already knew that Dr. Hale hated Dr. Mixon, and had threatened at one point to burn Dr. Mixon's house down. In light of this knowledge, the additional fact that Dr. Hale mailed Dr.

Mixon's tort claim to Shelton, Washington, is insignificant.

The next item is Dr. Grover's written statement that he heard Dr. Hale threaten to burn down plaintiff's house. Plaintiff asserts that Haws did not know of this statement, and supports this conclusion by pointing to Haws' deposition testimony wherein Haws stated that there was no corroboration for Dr. Hale's threat. But Haws' deposition testimony on this matter was not made in response to a question whether he knew of Dr. Grover's written statement. It would have been easy for plaintiff's counsel to ask Haws point-blank whether he knew of Dr. Grover's written statement. According to the deposition excerpts supplied by plaintiffs, this question was not asked and thus Haws never had an opportunity to testify whether he had knowledge of Dr. Grover's statement or not. After reading the deposition excerpts provided by counsel, it appears to the Court that Haws knew that Dr. Hale made such a threat but thought that it was just a general statement of hostility rather than a specific threat that would actually be carried out. Dr. Grover's written statement does not contradict this characterization, but would simply be cumulative evidence that the statement was made, a point that Haws does not dispute. Thus the Court can find nothing here that would cause it to change its opinion.

The final matter concerns the tire tracks and footprints. It does appear from the deposition testimony of Haws that he felt there was a match of the tracks and the footprints to an innocent bystander, when in fact no such match was ever made. The plaintiff is arguing that if Haws had knowledge that the tire tracks and footprints

did not match an innocent bystander, he might have pursued some of the other suspects more diligently. But it is also true that Haws knew that the investigating officers had found no match of the tire tracks with cars driven by Sherman Douglas, Dr. Hale, and two other suspects. Given this, it is highly speculative to assume that other suspects would have been pursued.

The Court shall therefore deny the Rule 59(e) motion.

DATED this 31st day of October, 1990.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED
STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134
	JUDGMENT
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and individual, Defendants.	(Filed OCT 31 1990) Civil No. 88-3086

The Court has examined the entire record concerning defendant Farmers' motion for summary judgment and plaintiffs' motion under Rule 59(e) to alter or amend judgment. Pursuant to the memorandum decision accompanying this order.

NOW, THEREFORE, IT IS HEREBY ORDERED that Farmer's motion for summary judgment be, and the same is hereby, GRANTED, and that Farmers have judgment against plaintiffs for its costs to be determined by the Clerk of Court after proper submission of cost bills.

IT IS FURTHER ORDERED that plaintiff's Rule 59(e) motion to alter or amend judgment be, and the same is hereby, DENIED.

DATED this 31st day of October, 1990.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED
STATES DISTRICT JUDGE

CLERK'S CERTIFICATE OF MAILING

I certify that a copy of the attached document was mailed to the following named persons:

Donald L. Harris, P. O. Box 50130, Idaho Falls, Idaho 83405
Paul S. Penland, P. O. Box 199, Boise Idaho 83701
James J. Davis, P. O. Box 1368, Boise Idaho 83701
Richard P. Wallace, 1010 Ironwood Drive, Coeur d'Alene, Idaho 83814
W. Marcus Nye, P. O. Box 1391, Pocatello, Idaho 83204
Ja6y [sic] R. McKenzie, Five East Oneida, Preston, Idaho 83263

DATED this 31st day of Oct, 1990.

JERRY L. CLAPP, Clerk

By /s/ Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 ORDER (Filed Jan 9, 1991)
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, and Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, and [sic] individual, Defendants.	Civil No. 88-3086

On October 31, 1990, the Court issued a judgment and memorandum decision in the above-entitled matter denying plaintiffs' motion under Rule 59(e), and granting defendant Farmers' motion for summary judgment. The Clerk's certificate of mailing attached to that decision indicates that a copy of the decision was sent to all

counsel except plaintiffs' counsel. The Court discovered this error of the Clerk's Office on January 9, 1991, and immediately contacted plaintiffs' counsel who confirmed that he had never received a copy of the decision and had no knowledge that the decision had been entered.

Under Fed.R.Civ.P. 60(a), this Court has the power to correct clerical mistakes in judgments. In addition, under Fed.R.App.P. 4 (a)(5), the District Court has the power upon a showing of good cause to extend the time for filing a notice of appeal. In accordance with the authority granted to this Court by these two rules, the Court shall order that the judgment and memorandum decision bearing the filing date of October 31, 1990, shall be deemed entered as to the plaintiffs as of January 10, 1991, for purposes of Federal Rules of Appellate Procedure 3 and 4. The Court makes this finding on the basis that a mistake was made in the Clerk's certificate of mailing and that the plaintiffs and their counsel never received a copy of the Court's decision and had no other knowledge of these decision. In addition, the Court finds that plaintiffs' counsel has proceeded diligently in all aspects of this case, and that good cause exists for correcting the mistake and extending the time for appeal.

Finding good cause therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that pursuant to Fed.R.Civ.P. 60(a) and Fed.R.App.P. 4(a)(5), the judgment and memorandum decision of this Court bearing the filing date stamp of October 31, 1990, be, and the same are hereby deemed entered for purposes of

Federal Rules of Appellate Procedure 3 and 4 as of January 10, 1991, as to the plaintiffs.

DATED this 9th day of January, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY N. MIXON, et al., Plaintiffs-Appellants, vs. FARMERS INSURANCE COMPANY OF IDAHO, et al., Defendants-Appellees.	No. 91-35417 DC# CV-87-4134-MJC CV-88-3086-MJC Idaho (Boise) ORDER (Filed Jul. 17, 1991)

Before: WALLACE, Chief Judge, KOZINSKI and TROTT, Circuit Judges

Appellee Farmers Insurance Company of Idaho ("FIC") has filed a motion to dismiss this appeal, contending the district court's order granting summary judgment in favor of FIC is a nonfinal order. Appellees Gunnell and Schvaneveldt and appellees Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement have filed motions to dismiss this appeal on the ground appellants' notice of appeal is untimely. This court has reviewed appellees' motions, appellants' oppositions thereto, and this court's records.

In regard to appellee FIC, court records indicate that although FIC has been dismissed, appellants' claims against other parties remain pending. Thus, the order granting summary judgment in favor of FIC is a nonfinal nonappealable order. *See Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985). Because the district court has not granted appellants' motion for

Fed. R. Civ. P. 54(b) certification, FIC's motion to dismiss is granted.

As to appellees Gunnell and Schvaneveldt and appellees Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement, the record shows that appellants failed to file a motion to extend the time for appeal within either the thirty-day period following the district court's October 31, 1990 order or the subsequent thirty-day period. Therefore, appellants were not entitled to an extension under Fed. R. App. P. 4(a)(5). *See Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1411 (9th Cir. 1986) (per curiam).

Also, the district court improperly relied on Fed. R. Civ. P. 60(a) to grant relief. Rule 60(a) was not designed to correct the type of error that occurred in this case. *See Waggoner v. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam). Accordingly, appellants were not entitled to relief under Rule 60(a).

Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' Sept. 5, 1990 motion to amend judgment. Thus, under the test set forth in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b). Therefore, the motions to dismiss filed by Gunnell and Schvaneveldt and Jones, Haws, Olmstead, Birch, and Idaho Department of Law Enforcement are also granted.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY N. MIXON, et al., Plaintiffs-Appellants, vs. FARMERS INSURANCE COMPANY OF IDAHO, et al., Defendants-Appellees.	No. 91-35417 DC# CV-87-4134-MJC CV-88-3086-MJC Idaho (Boise) ORDER (Filed SEP 12 1991)

Before: WALLACE, Chief Judge, KOZINSKI, and TROTT, Circuit Judges

Appellants' suggestion for rehearing en banc is denied.

Appellants' petition for rehearing is granted in part as follows: On July 19, 1991, the district court certified its order granting summary judgment in favor of Farmers Insurance Company ("FIC") as final pursuant to Fed. R. Civ. P. 54(b). Accordingly, this appeal is reinstated as to FIC.

However, to the extent appellants' petition seeks rehearing as to any other issue or any other appellee, the petition is denied.

The clerk shall set a briefing schedule upon the filing of this order.

MoCal 7/15/91 (Mem 8/91)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FRANKLIN COUNTY, STATE OF IDAHO, et al.,

Defendants.

Civil No. 87-4134

MEMORANDUM DECISION

(Filed Dec. 23, 1991)

JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife,

Plaintiffs,

-vs-

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation,TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

Civil No. 88-3086

The Court has before it a motion for relief from judgment brought under Fed.R.Civ.P. 60(b)(1) filed by the plaintiffs. The Court heard oral argument on December 17, 1991, and the motion is now at issue. The Court will review the history of this litigation before resolving the motion.

The plaintiffs, Dr. Jerry Mixon and his wife, Marilyn, filed two cases – since consolidated – alleging that their civil rights were violated when various government officials and private individuals conspired to revoke Dr. Mixon's hospital privileges and charge him with the crime of arson. Dr. Mixon sued numerous defendants including state and county governments, law enforcement and prosecutorial officials, a city hospital, certain members of the hospital's board of trustees, the hospital's administrator, and a member of the hospital's medical staff. Additional defendants included Farmers Insurance Company of Idaho; TWI, Inc.; and Robert Mangini, an arson investigator.

Some of these defendants filed motions for summary judgment which were granted on January 19, 1990. A copy of the Court's memorandum decision and judgment was mailed to all counsel.

On January 29, 1990, Dr. Mixon filed a motion to reconsider the grant of summary judgment, and a motion to certify the decisions as final to permit an appeal. On August 27, 1990, the Court denied the motion for reconsideration and granted the motion to certify. A copy of this order was sent to all counsel.

Dr. Mixon then filed a motion to amend pursuant to Fed.R.Civ.P. 59(e) on September 5, 1990, in an attempt to persuade the Court to look at new evidence. Sometime thereafter, the case was reassigned to newly-appointed Judge Edward J. Lodge. Judge Lodge proceeded to rule on a few housekeeping motions, and then later reassigned the case to this Court on October 18, 1990.

About thirteen days later with no advance notice to counsel or oral argument, the Court entered a memorandum decision and judgment denying the plaintiffs' motion to amend. Unfortunately, the Clerk of the Court neglected to send a copy of the Court's decision denying the motion to amend to counsel for the plaintiffs. Consequently, the plaintiffs had no knowledge that the Court had rendered a decision.

Fifty-four days later, on December 24, 1990, plaintiffs' counsel called this Court's chambers inquiring about the status of the motion to amend. He talked to a law clerk who was unfamiliar with the case and was therefore unable to get any information about the motion to amend. The law clerk who was familiar with the case was on vacation and returned around January 9, 1991. Upon discovering that the Clerk's certificate of mailing did not list plaintiffs' counsel, this law clerk called plaintiffs' counsel and told him that the decision had been entered but never mailed to him. On the same day, this Court entered an order based on Fed.R.Civ.P. 60(a) and Fed.R.App.P. 4(a)(5) extending the time for filing a notice of appeal. There was no oral argument or briefing submitted prior to the issuance of this order; the Court issued the order sua sponte.

The plaintiffs then pursued their appeal to the Ninth Circuit. The defendants responded with a motion to dismiss, asserting that Fed.R.Civ.P. 60(a) did not apply to this situation. In addition, defense counsel argued that Rule 60(b) was inapplicable. Plaintiffs' counsel responded that Rule 60(b) did apply and should permit an extension

of the time to appeal. Both sides filed affidavits explaining this Court's motion practice and the factual circumstances surrounding the motion to amend.

The Circuit Court granted the motion to dismiss, finding that this Court's reliance on Rule 60(a) was misplaced because that rule was not designed to correct mistakes of the type that occurred here. The Ninth Circuit then went on to state:

> Finally, the evidence does not support *the district court's finding* that the appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' September 5, 1990, motion to amend judgment. Thus, under the test set forth in *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc), appellants were not entitled to relief under Rule 60(b). Therefore, the motions to dismiss filed by Gunnell and Schvaneveldt and Jones, Haws, Olmstead, Birch, and the Idaho Department of Law Enforcement are also granted.

Mixon v. Farmers No. 91-35417, slip op. at 2 (9th Cir. July 17, 1991) (emphasis added).

The Ninth Circuit appears to have labored under the mistaken assumption – fostered undoubtedly by certain language in this Court's opinion – that the order of January 9, 1991, was based in part on Rule 60(b). It was not. This Court did not cite or rely upon Rule 60(b) in that order of January 9, 1991. The Court does see, however, that its own unfortunate choice of language led the Ninth Circuit astray on this point. In this Court's order, the Court cited to Rule 60(a) and then stated that

> the Court finds that plaintiffs' counsel has proceeded *diligently* in all aspects of this case. . . .

Order of January 9, 1991, at p.2 (emphasis added).

The Circuit Court understandably felt that this Court was making a crucial finding for *Rule 60(b)* purposes under the test enunciated in *Rodgers v. Watt, supra*: That plaintiffs' counsel acted with due diligence to ascertain whether the Court had issued an order on his pending motion. But this Court made no such finding. This Court did not cite or discuss the *Rodgers* opinion or Rule 60(b). The Court had no motion, briefing, or affidavits before it when it made its ruling. The order was based solely on Rule 60(a). It is mere happenstance that the Court's use of the word "diligently" coincides with the "due diligence" standard of *Rodgers*: The Court meant that plaintiffs' counsel had never missed deadlines or been dilatory in the past, not that plaintiffs' counsel had used due diligence in checking on the status of the motion to amend. The Court does recognize that its choice of language was unfortunate and has led to this misunderstanding. The bottom line, however, is that the order of January 9, 1991, was not based on Rule 60(b) in any way.

Defense counsel nevertheless argues that many of the affidavits submitted by the plaintiffs in this Court are identical to those submitted to the Circuit, and thus should not be considered. But these affidavits have never been examined by this Court. This Court has never decided whether plaintiffs' counsel exercised the due diligence required by Rule 60(b). A finding of due diligence is factual in nature and is left to the sound discretion of the trial court. *Rodgers v. Watt, supra.* Defense counsel

offers no authority holding that the Circuit would have original – as opposed to appellate – jurisdiction to consider a Rule 60(b) motion. In fact, the law is directly opposite. *See Pollard v. Supreme Court for State of Michigan*, 334 F.2d 129 (6th Cir. 1964) (Court of Appeals' jurisdiction is appellate in nature and does not include original action for writ of mandate.); *United States v. Apex Distributing Co.*, 270 F.2d 747, 749 (9th Cir. 1959) (Federal courts have appellate jurisdiction only to the extent conferred by statute.). In this case, the statutes conferring appellate jurisdiction are 28 U.S.C. §§ 1291, 1292. These statutes do not grant the Circuit original jurisdiction to rule on a 60(b) motion.

Because this Court has not resolved the due diligence issue, and because it appears that such a factual issue cannot be resolved in the first instance by the Circuit, the Court finds that it must make a ruling on whether plaintiffs' counsel used due diligence to check on his pending motion to amend. This decision is not affected by the law of the case doctrine. That doctrine prevents reconsideration of issues already resolved. *Milgard Tempering, Inc. v. Selas Corporation of America*, 902 F.2d 703, 715 (9th Cir. 1990). This issue is not being "reconsidered"; rather, it is being "considered" for the first time at the trial level.

Turning now to the merits of the Rule 60(b) motion, the Court finds that the applicable standard is set forth in the Ninth Circuit by *Rodgers v. Watt, supra.* The only element that is in real dispute is the requirement that plaintiffs' counsel act with due diligence to inquire about the status of his motion. In *Rodgers* itself, the Circuit found that an attorney acted with diligence when he sent his secretary to the clerk's office every thirty days or so to

check on the status of a pending motion. Here, plaintiffs' counsel waited about another twenty-four days – a total of fifty-four days – to check on his case. During this time there were four motions to dismiss and motions for summary judgment pending in this large and very complex case. Plaintiffs' counsel had no reason to suspect an expedited resolution of his motion to amend since it took the Court a number of months to rule on the immediately preceding motion to reconsider.[1] Plaintiffs' counsel could have made further phone calls on December 24th to track down the motion's status, but his failure to do so was excusable in that he was given no clue by the law clerk he talked to that a decision had been entered, and further because it was Christmas Eve, a time when our hearts turn toward the hearth, not the file drawer.

Given the complexity of this case, the numerous pending motions, the fact that plaintiffs' counsel did inquire within fifty-four days of the decision, and the delay in prior rulings, the Court finds that plaintiffs' counsel did act with due diligence in inquiring about the status of his motion. The Court will therefore grant the plaintiffs relief from the filing date of the judgment of October 31, 1990, and provide that the filing date of that

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[1] Plaintiffs filed their motion to amend on September 5, 1990. Statistics available in the district court Clerk's Office show that the average time from filing to disposition of non-dispositive motions is 110 days. Plaintiffs' motion to amend was decided in fifty-six days, about one-half the normal time.

judgment for purposes of appeal shall be the filing date of this order.

DATED this 23rd day of December, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants.	Civil No. 87-4134 ORDER (Filed Dec. 23, 1991) Civil No. 88-3086
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs, -vs- FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual, Defendants.	

The Court has examined the entire record concerning the motion for relief from judgment filed pursuant to Rule 60(b)(1) by the plaintiffs. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that the plaintiffs' motion for relief from judgment pursuant to Rule 60(b)(1) be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the plaintiffs have relief from the filing date of the judgment of October 31, 1990, and that the filing date of that judgment for purposes of appeal shall be the filing date of this order.

DATED this 23rd day of December, 1991.

/s/ Marion J. Callister
MARION J. CALLISTER
SENIOR UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, v. FRANKLIN COUNTY, et al., Defendants, and EUDEAN GUNNELL, individually and in his capacity as Franklin County Sheriff; GARY SCHVANEVELDT, individually and in his capacity as Franklin County Deputy Sheriff; JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT, Defendants-Appellees.	No. 92-35065 D.C. No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation,

Defendant,

and

TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants-Appellees.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their

No. 92-35119

D.C. No. CV 87-4134

capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT,

Defendants-Appellants.

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

EUDEAN GUNNELL, individually and in his official capacity as Franklin County Sheriff, GARY SCHVANEVELDT, individually and in his official capacity as Franklin County Deputy Sheriff,

Defendants-Appellants.

No. 92-35122

D.C. No. CV 87-4134-MJC

MEMORANDUM

(Filed Sept. 3, 1993)

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,	)	
Plaintiffs,	)	D.C. No. CV 88-3086-MJC
v.	)	Lead No. CV 87-4134-MJC
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,	)	
Defendants.	)	

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, Chief Judge, Presiding

Argued and submitted June 7, 1993
Seattle, Washington
Filed September 3, 1993
Before: BRUNETTI, LEAVY and TROTT, Circuit Judges.

On January 9, 1991, the district court entered an Order to deem the judgment of October 31, 1990, entered effective "January 10, 1991, for purposes of Federal Rules of Appellate Procedure 3 and 4." Nevertheless, a motions panel of this court granted a motion to dismiss the pending appeal, concluding in its order of July 15, 1991 as follows:

> Finally, the evidence does not support the district court's finding that appellants' counsel acted with due diligence to ascertain whether an order had been entered regarding appellants' September 5, 1990 motion to amend judgment.

> Thus . . . appellants were not entitled to relief under Rule 60(b).

A petition for rehearing and suggestion for rehearing *en banc* was filed addressing in part the applicability of Rule 60(b) to the facts of the instant case. On September 12, 1991, the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected.

Despite the motion panel's decision, the Mixons returned to district court and filed a motion for relief pursuant to Rule 60(b), in which they sought an extension of the time to appeal. On December 23, 1991, the district court granted the Mixons' Rule 60(b) motion, and the Mixons were given additional time to file an appeal.

The decision of an appellate court on a legal issue " 'must be followed in all subsequent proceedings in the same case.' " *Maag v. Wessler,* No. 92-36657, slip op. 5343, 5348 n.2 (9th Cir. May 24, 1993) (quoting *Waggoner v. Dallaire,* 767 F.2d 589, 593 (9th Cir. 1985)) (internal quotations omitted). The motions panel held that under Rule 60(b), the Mixons were not entitled to relief and that their appeal was untimely. In *Hanna Boys Center v. Miller,* 853 F.2d 682 (9th Cir. 1988), this Court ruled that an order of a motions panel vacating an order previously entered by the district court was the law of the case. *Id.* at 685-86. The motions panel in the present case ruled on the Rule 60(b) motion and determined that the Mixons' appeal was untimely. The Mixons had specifically asserted to the motions panel that in rendering a determination with respect to Rule 60(b), the motions panel was overstepping its bounds and was usurping the authority of the district

court. The motions panel rejected this claim. Thus, this ruling became the law of the case.

The test to determine whether a district or appellate court may revisit a prior decision by an appellate court is whether, subsequent to that decision, the Supreme Court has spoken on the issue, a legislative act has been taken, or if there has been an *en banc* decision affecting the prior order. *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984). None of the above occurred in the case at bar. Therefore, because the motions panel had ruled on the applicability of Rule 60(b), the district court was obligated to follow the law of the case and could not thereafter rule differently, as it did on Mixons' Rule 60(b) motion.

In case No. 92-35119, the defendants, in their amended notice of cross appeal, state that they "appeal from that portion of the Memorandum Decisions and Order of the Honorable Marion J. Callister filed January 19, 1990, wherein the court failed to dismiss the action against these defendants as to State tort cause of action." Those parties failed to raise the issue in their brief, so we deem it abandoned.

In appeal Nos. 92-35119 and 92-35122, the district court's order granting Rule 60(b) relief is REVERSED and appeal No. 92-35065 is DISMISSED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, v. FRANKLIN COUNTY, et al., Defendants, and EUDEAN GUNNELL, individually and in his capacity as Franklin County Sheriff; GARY SCHVANEVELDT, individually and in his capacity as Franklin County Deputy Sheriff; JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT, Defendants-Appellees.	No. 92-35065 D.C. No. CV 87-4134-MJC ORDER (Filed Oct. 20, 1993)

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation,

Defendant,

and

TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants-Appellees.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

JIM JONES, individually and in his capacity as Idaho Attorney General; MARC HAWS, individually and in his capacity as Idaho Deputy Attorney General; JOHN OLMSTEAD and SCOTT BIRCH, individually and in their

No. 92-35119

D.C. No. CV 87-4134

capacities as investigators for the Idaho Department of Law Enforcement; and the IDAHO DEPARTMENT OF LAW ENFORCEMENT,

Defendants-Appellants.

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs,

v.

FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,

Defendants.

D.C. No. CV 88-3086-MJC
Lead No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,

Plaintiffs-Appellees,

v.

FRANKLIN COUNTY, et al.,

Defendants,

and

EUDEAN GUNNELL, individually and in his official capacity as Franklin County Sheriff, GARY SCHVANEVELDT, individually and in his official capacity as Franklin County Deputy Sheriff,

Defendants-Appellants.

No. 92-35122

D.C. No. CV 87-4134-MJC

JERRY N. MIXON, M.D., and MARILYN MIXON, husband and wife,	)	
Plaintiffs,	)	D.C. No. CV 88-3086-MJC
v.	)	Lead No. CV 87-4134-MJC
FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual,	)	
Defendants.	)	

Before: BRUNETTI, LEAVY and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, vs. FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants-Appellees.	
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual, Defendants-Appellees.	COURT OF APPEALS DOCKET NO. 91-35417

Appeal from the United States District Court

For The District of Idaho

AFFIDAVIT OF JOHN C. LYNN

ATTORNEY FOR APPELLANTS:

JOHN C. LYNN
LYNN, SCOTT, HACKNEY & JACKSON
1015 West Hays Street
Boise, Idaho 83702
Telephone: (208) 342-7600

STATE OF IDAHO)
:ss
County of Ada)

JOHN C. LYNN, Being first duly sworn upon oath, deposes and says:

1. That I am counsel of record for the Plaintiffs/ Appellants in the above-entitled consolidated actions.

2. That these actions were commenced by the filing of Complaints in 1987 and 1988 in these cases.

3. That the documents and records in these cases are extremely voluminous and that the litigation has been long and complex.

4. That on January 19, 1990 the Honorable Marion J. Callister, Senior District Judge for the District of Idaho, who had been assigned to this case initially, entered a Memorandum Decision and Order granting various Defendants', including the Appellees Gunnell and Schvaneveldt, Motions for Summary Judgment. The essence of the Court's determinations were that various local and state law enforcement officials as well as private parties were entitled to immunity, either absolute or qualified, which precluded the continuance of these actions against those parties.

5. That immediately after receipt of this Decision and Order I filed Motions for Reconsideration and Motions to Certify this determination as final pursuant to Rule 54(b), F.R.C.P., in order to challenge the rulings of the District Court on these crucial issues by way of appeal.

6. That thereafter numerous documents and motions were filed by all parties, discovery continued in these cases and various actions were taken by all parties and/or the Court with respect to this case.

7. That I am familiar with the general practice of the United States District Court for the District of Idaho and that that practice includes the conduct of hearings on all major motions addressed to the Court before any ruling or Judgment is entered in cases of this type. The only exception to the conduct of hearing on such major motions would be in circumstances where the parties stipulated to submit the matter on the basis of the brief or records.

8. That it was not until August 27, 1990 that the Honorable Marion J. Callister entered a Decision and Order granting the Rule 54(b) Certification and entering Judgment to allow these matters to be appealed. Because I felt that the August 27, 1990 Judgment and Decision had neglected to evaluate significant items of evidence, I timely filed a Motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to amend said Judgment. Said Motion was filed on September 5, 1990.

9. In approximately May of 1990 this case was assigned by Judge Callister to a new District Court Judge,

the Honorable Edward J. Lodge, for purposes of further proceedings in this case.

10. That because of Judge Lodge's unfamiliarity with this case and the issues that had been raised for the preceding two years, I, on two occasions during the summer months of 1990, repeatedly made contact with Judge Lodge's law clerks and/or secretaries in an attempt to determine when a hearing would be scheduled on the Motion to Amend in order to argue the matter as raised by said Motion. I was advised that no hearing had yet been scheduled and that I would be advised of the same.

11. That on October 22, 1990 Judge Lodge entered an Order reassigning these cases to the Honorable Marion J. Callister.

12. That without a hearing and within seven days thereafter, the Honorable Marion J. Callister entered his Memorandum Decision and Order granting the Defendant's Farmers Insurance Company Motion for Summary Judgment and denying the Plaintiffs' Rule 59(e) Motion to Amend.

13. That neither counsel for Farmers Insurance Company, David R. Maguire, nor myself as counsel for Plaintiffs were ever notified that such a Memorandum Decision and Order had been entered.

14. That it was not until January 9, 1991 that I was contacted by Judge Callister's clerk to determine whether or not copies of that Decision had been forwarded to myself as counsel for the Plaintiffs. I advised the Court that we had never received the same and that we

intended to pursue an appeal in this case and would file a necessary Motion seeking to extend the time for appeal.

15. Before any action could be taken on my part the Court entered an Ex Parte Order on January 9, 1991 which in essence determined that the Court's Decision and Order of October 31, 1990 would be deemed filed as to the Plaintiffs as of January 10, 1991 for purposes of pursuing an appeal.

16. That after receipt of that Order I did not hear from counsel for any Defendant objecting to the same or otherwise questioning the procedure employed by Judge Callister.

17. That I did not believe that any further action was required on my part in the form of filing a Motion for an Extension of Time to Appeal in light of the Court's Ex Parte Order entered on January 9, 1990.

18. That thereafter I timely filed the Notice of Appeal from the adverse rulings of the Court on February 5, 1991, within thirty days following the Court's entry of its Order of January 9, 1991.

DATED This 31 day of May, 1991.

/s/ John C. Lynn
JOHN C. LYNN

SUBSCRIBED AND SWORN TO Before me this 31 day of May, 1991.

[SEAL]

/s/ Toni McIntier
Notary Public for Idaho
Residence: Boise, ID
My Commission Expires: 1/4/96

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, vs. FRANKLIN COUNTY, STATE OF IDAHO, et al., Defendants-Appellees.	
JERRY N. MIXON, M.D. and MARILYN MIXON, husband and wife, Plaintiffs-Appellants, vs. FARMERS INSURANCE COMPANY OF IDAHO, an Idaho corporation, TWI, INC., an Idaho corporation, and ROBERT G. MANGINI, an individual, Defendants-Appellees.	COURT OF APPEALS DOCKET NO. 91-35417

Appeal from the United States District Court

For The District of Idaho

BRIEF OF APPELLANTS IN RESPONSE AND OPPOSITION TO CERTAIN APPELLEES' MOTION TO DISMISS APPEAL

ATTORNEY FOR APPELLANTS:

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I

STATEMENT OF THE CASE

A. SUMMARY

Two of the Appellees in this appeal, Eudean Gunnell and Gary Schvaneveldt, have filed a Motion to Dismiss Appeal in this action supported by a Memorandum of Law and the filing of certain materials in support thereof. The gravamen of these parties' Motions is that the appeal is untimely under Rule 4(a)(1) Federal Rules of Appellate Procedure and must be dismissed and/or that they are prejudiced in some way by the filing of the Notice of Appeal warranting dismissal. Appellants contend that

neither proposition is true and that their Motion must be denied.

B. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

The nature of the facts and the proceedings in the District Court are extensive. Jerry Mixon, a licensed physician, and his wife, Marilyn Mixon, filed two civil lawsuits in 1987 and 1988 in the United States District Court for the District of Idaho. At the time of filing these actions, the Mixons were residents of the State of Washington. The first case filed was entitled *Mixon v. Franklin County, et al.*, and was identified as Civil No. 97-4134 in the District Court. The second action filed was entitled *Mixon v. Farmers Insurance Company of Idaho, et al.*, and was identified as Civil No. 88-3086 in the District Court. These cases were consolidated for trial and discovery purposes by Orders of the District Court on March 13 and 16, 1989. CR 131 and 134.

The action in Civil No. 87-4134 was brought against State and County governments and certain law enforcement, prosecutorial and governing officials thereof, as well as against a County hospital, certain members of its Board of Trustees, the Hospital Administrator and a member of the Hospital's medical staff. The Appellees who seek dismissal of this Appeal are Eudean Gunnell, the Franklin County Sheriff, and his deputy sheriff, Gary Schvaneveldt, who were defendants in this action. The action in Civil No. 88-3086 was brought against non-governmental parties, to-wit, Farmers Insurance Company of Idaho, an Idaho Corporation, TWI, Inc., an Idaho

corporation, and Robert Mangini, an individual Idaho resident.

The statutory basis of jurisdiction in Civil No. 87-4134 was 28 U.S.C. § 1332(a)(1) – diversity jurisdiction with an amount in controversy in excess of $10,000.00, and 28 U.S.C. § 1343(a)(3) – for deprivation of the Mixons' constitutional and civil rights protected by 42 U.S.C. § 1983. Additional claims of the violation of the Mixons' rights protected by the Idaho Constitution and Idaho state law were also asserted under the doctrine of pendent jurisdiction.

The statutory basis of jurisdiction in Civil No. 88-3086 was 28 U.S.C. § 1332(a)(1) – diversity jurisdiction with an amount in controversy in excess of $10,000.00 and 28 U.S.C. § 1343(a)(3) and (4) – for deprivation of the Mixons' constitutional and civil rights in conspiracy with the governmental defendants named in Civil No. 87-4134 as protected by 42 U.S.C. § 1983. This action also alleged that these defendants were negligent in the conduct of an arson investigation.

The factual scenario which lead to the initiation of these complaints had its genesis in approximately 1981 after Dr. Mixon had joined the medical staff of the Franklin County Hospital (now the Franklin County Medical Center) located in Preston, Idaho, a small, largely rural town in southeast Idaho. Dr. Mixon became aware, shortly after the inception of his practice in this community, that another physician on the hospital medical-staff, Dr. Boyd Hale, was ill-trained or educated and consistently committed malpractice which caused actual harm to many patients of the hospital. In an effort to correct these deficiencies, Dr. Mixon and the other physicians on

staff sought the assistance of the hospital administrator and Board of Trustees. All their efforts were thwarted by these officials because of the prominence of Dr. Hale and his personal or professional relationship with many of these individuals. The physicians ultimately sought assistance and review of these problems by the Idaho State Board of Medicine, the State Hospital Licensing authority and various community officials. The action of these authorities resulted in the suspension and probationary practice of Dr. Hale and a suspension of the hospital's license. This in turn engendered a storm of indignation and reprisal directed against Dr. Mixon by Dr. Hale and the various hospital and other county officials, ultimately resulting in a retaliatory suspension of Dr. Mixon's hospital staff privileges and a refusal to acknowledge him as Chief of Staff of the hospital medical staff. Dr. Hale threatened the Mixons with physical harm and with destruction of their property.

Dr. Mixon ultimately decided to remove himself from this acrimonious environment and relocated his practice to Shelton, Washington in early 1986. Two days after he left the community, his home in Preston was burned to the ground by an arsonist. The ensuing investigation and events involved State and county law enforcement officials, including these moving Appellees, and Farmers Insurance Company and their retained fire investigators named as defendants in Civil No. 88-3086 below. Ultimately, Dr. Mixon was charged with arson. All charges were dismissed following a preliminary hearing in state court. Dr. and Mrs. Mixon then instituted these actions against the various defendants, alleging in essence that they had conspired together to pursue the frivolous and

unfounded arson investigation and charges and to destroy his medical practice and remove him from the community in retaliation for his outspoken criticisms of a powerful member of the community, Dr. Hale.

The proceedings in these consolidated actions were voluminous as can be partially discerned from the District Court Docket Sheet, filed with these materials. See Exhibit 1 to Notice of Filing. Nearly all parties filed Motions for Summary Judgment, Motions to Dismiss or related Motions seeking the dismissal of claims on various theories including absolute and qualified immunity. These Motions commenced as early as 1988 and continued through 1990. At various times these Motions were heard and reviewed by the Senior District Court Judge, the Honorable Marion J. Callister, by another District Court Judge, the Honorable Edward J. Lodge and by Magistrates appointed by the Court to hear various discovery and related Motions. Hearings on these various Motions occurred at various times throughout 1988, 1989 and 1990.

The general practice in the District of Idaho is that all Motions raising significant and important questions, in particular Motions for Summary Judgment, were always subject to hearing by a Judge of the District Court before a ruling or adjudication of the same. See Affidavit of John C. Lynn, Exhibit 3 to Notice of Filing. In these consolidated actions, the Summary Judgment Motions of various State Defendants were heard on September 8, 1989 and taken under advisement. CR 189. The Summary Judgment Motions of, inter alia, Gunnell and Schvaneveldt were heard on December 8, 1989 and taken under advisement on that date. CR 226.

On January 19, 1990 Judge Callister entered his Memorandum Decision and Order that granted various Defendants' in both pending actions Motions for Summary Judgment or Motions to Dismiss. Copies of this Decision and Order were sent to all counsel of record. Exhibit 4 to Notice of Filing.

Following receipt of this Memorandum Decision and Order continuous action in this case occurred. Depositions of various parties continued to be taken and additional parties, Plaintiff and Defendant, filed numerous motions thereafter. On January 29, 1990 counsel for the Mixons filed a Motion to Certify the Memorandum Decision and Order of January 19, 1990 as a final Judgment appealable under Rule 54(b) and simultaneously filed a Motion for Reconsideration of the Court's Decision, supported by Memorandum of Law. Exhibits 5 and 6 respectively to Notice of Filing. As can be seen from the Clerk's Docket Sheet, numerous motions, discovery and related activities occurred between this date and the ultimate Decision by the District Court on August 27, 1990, wherein Judge Callister entered a final Judgment and Rule 54(b) Certification authorizing the appeal of the Court's prior rulings of January 19, 1990. Exhibit 7 to Notice of Filing. Immediately thereafter, counsel for the Mixons filed a Motion to Amend the Court's Judgment, pursuant to Rule 59(e), F.R.C.P. (Exhibit 8 to Notice of Filing), supported by an Affidavit of Plaintiffs' counsel, a Memorandum of Law in support of the Motion to Amend Judgment and Excerpts of the record and exhibits with respect to this Motion.

Sometime thereafter, this case was assigned to a new District Judge, the Honorable Edward J. Lodge, whose

action on various interim motions is demonstrated by the Clerk's Docket Sheet. See e.g. CR 319, 336 and 349. As further indicated in the Affidavit of John C. Lynn filed in support of this response, counsel for the Plaintiffs from time to time checked with either Judge Lodge's secretary or his law clerks regarding the scheduling of a hearing on the Motion to Amend. No date was scheduled for this Motion and counsel was advised that he would be advised of further proceedings.

On October 18, 1990 the Honorable Edward J. Lodge entered an Order reassigning this case to the Honorable Marion J. Callister. CR 349. Thereafter the parties continued to file documents in support and in opposition to the Motion to Amend the Judgment as well as other pleadings. Inconsistent with the Court's prior practice, no hearing was scheduled on the Motion to Amend and a Memorandum Decision and Judgment was entered by the Honorable Marion J. Callister, denying the Motion to Amend, on October 31, 1990. Exhibit 9 to Notice of Filing. As appears from the Clerk's Certificate of Mailing on the Memorandum Decision dated October 31, 1990, certain counsel were mailed copies of this Decision and Judgment on that date. Significantly omitted from the Clerk's Certificate of Mailing were Plaintiffs' counsel and counsel for the Defendant Farmers Insurance Company in Civil No. 88-3086. See Affidavit of Rod G. Briggs, Exhibit 2 to Notice of Filing. This oversight apparently was occasioned by the Clerk's Certificate of Mailing having been typed by the secretary to Judge Callister and the same being overlooked by the Clerk of the Court when said documents were mailed. Neither Plaintiffs' counsel nor

counsel for Farmers Insurance Company, one of the parties directly affected by this Judgment, received a copy of this Memorandum Decision and Judgment. See the Motion by Farmers for Relief from Judgment for Failure of Notice. CR 380 and 382. Again, further proceedings, motions, memoranda, magistrate decisions, reports and various other documents continued to be filed by the parties.

Apparently on or about January 9, 1991, Judge Callister, in reviewing the proceedings to date, determined that the Clerk had erred in not forwarding copies of the October 31, 1990 Memorandum Decision and Order to counsel for the Plaintiffs. Upon discovery of this error, Judge Callister contacted, via his clerk, counsel for the Plaintiffs to determine whether or not said documents had been received by counsel for the Plaintiffs. Upon being advised that they had not, Judge Callister, sua sponte, entered an order dated January 9, 1991, extending the time for purposes of appeal by the Plaintiffs effective as of January 10, 1991, pursuant to Rule 60(a), F.R.C.P. and Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Exhibit 10 to Notice of Filing.

No objection by counsel for Defendants Gunnell and Schvaneveldt was ever made to this Order entered by Judge Callister, nor did any other party ever object to the action of the Court taken in its Order of January 9, 1991. Pursuant to this Order and in conformity with Plaintiffs' counsel's intention to appeal the adverse rulings of the District Court, a Notice of Appeal was filed on February 5, 1991 in both of these consolidated actions. Exhibit 11 to Notice of Filing. This Notice of Appeal specifies that an appeal was being taken from the granting of Summary

Judgment to Farmers Insurance Company adjudicating all claims as to that party by virtue of the October 31, 1990 Memorandum Decision and Judgment. Also specified in the Notice of Appeal was an appeal from the Court's denial of the Motion to Amend Judgment which effectively put all parties on notice that an appeal was being taken from the Court's prior rulings dismissing the Defendants Gunnell and Schvaneveldt and other Defendants from this case.

Following the filing of the Notice of Appeal, counsel for Appellants, determining that no transcript was necessary in light of the Court's rulings on these matters on the basis of Summary Judgment Motions, designated that no transcript on appeal was necessary and forwarded to the Court of Appeals the Appellants' Docketing Statement relating to District Court Case No. 88-3086. Defendants Gunnell and Schvaneveldt subsequently filed a response to the Docketing Statement raising the question of jurisdiction in this matter and the timeliness of appeal. An Order was entered by Kathleen Marcel, Conference Attorney for the Ninth Circuit, on May 28, 1991, advising that if the Defendants intended to pursue their objections to jurisdiction that the same would be required to be done by a formal Motion to Dismiss these proceedings.

On or about May 22, 1991 Defendants Gunnell and Schvaneveldt filed such a Motion. Because Appellants believe that the Motion is unsupported by the record, contrary to the rulings of the trial Court and unsupported in law, this opposition is filed in response to the same.

II

ARGUMENT

A. SUMMARY

The Defendants Gunnell and Schvaneveldt challenge the filing of the appeal in this case on the basis that the same is untimely under Rule 4 of the Federal Rules of Appellate Procedure. The argument of counsel for these Defendants is that in essence, even though the Appellants did not receive notice of the District Court's Memorandum Decision and Order of October 31, 1990, an appeal would have been required to have been filed within thirty days of that determination. Further these Appellees argue that the failure of the Clerk to provide notice to counsel for the Appellants of that Decision pursuant to the terms of Rule 77(d) of the Federal Rules of Civil Procedure does not warrant the District Court's ultimate extension of time to appeal in this case. These Appellees further argue that the District Judge was without jurisdiction and/or abused his discretion in entering the order of January 9, 1991 authorizing an extension of time within which to appeal. For these reasons these Appellees argue that this appeal should be dismissed.

B. RELIEF FROM A JUDGMENT ENTERED WITHOUT NOTICE IS AVAILABLE UNDER RULE 60, F.R.C.P.

The brief of Appellees, Gunnell and Schvaneveldt, filed in this appeal argues in essence for an inflexible "draconian" rule that no appeal should be permitted that is filed later than the thirty day period provided by Rule

4(a)(1), F.R.A.P. under any circumstances. See e.g. page 14, Appellee's Memorandum. They suggest that this absolute rule was adopted by the District of Columbia Court of Appeals in *Polylok v. Manning*, 793 F.2d 1318 (D.C. 1986), and should be applied in this case. However, this position is wholly untenable in light of clearly established precedent in this Circuit and is contrary to both good sense, fairness and equity. Further, such a result is totally inappropriate under the facts of this case.

The principal decision of this Court which addresses the issues raised by this challenge to appellate jurisdiction is the en banc panel opinion in *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983). Although referenced in Appellee's submissions the substance and significance of the holding in *Rodgers* was either intentionally ignored or purposefully obfuscated by Appellee's discussion. *Rodgers*, as does this case, involved the entry of a judgment without notice to the appellants. The failure of notice of the entry of judgment was solely assignable to an error or oversight of the Clerk of the Court in violation of Rule 77(d) F.R.C.P. The appellant in that case did not learn of the error until more than sixty days had elapsed after the entry of the judgment. Upon being apprised of the error by the Clerk's office the appellant filed a Rule 60(b) motion for relief which was granted by the District Court. Thereafter an appeal was perfected within sixty days of the entry of the trial court's Rule 60(b) order.[1] The panel, sua sponte, requested that timeliness of the appeal

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[1] This was timely because of the sixty day rule for appeal where the United States is a party. Rule 4(a), F.R.A.P. Otherwise the Rule requires appeal within thirty days.

be addressed and after review affirmed the order of the trial court. *Rodgers* discussed at length the interplay between the provisions of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. As observed in *Rodgers*, Rule 4(a)(1), F.R.A.P. requires an appeal within thirty days of entry of judgment. Rule 4(a)(1) allows this time for appeal to be extended for an additional thirty days "upon a showing of excusable neglect or good cause" if a motion for this relief is filed within this thirty day period. However, *Rodgers* involved a case where no knowledge of the entry of the judgment was present until after the expiration of this sixty day period. Confronted with the practical impossibility of timely appeal under these circumstances, the Court acknowledged that relief was available under the Rule 60(b) excusable neglect standard. The panel noted at 722 F.2d 456, 459:

> "Rule 4(a)(5) by its terms is inapplicable to situations when notice of entry of judgment is not received until after the thirty day period authorized for the motion. Fed.R.Civ.P. 60(b), however, does provide for relief from a final judgment for a variety of reasons. The motion must be made within a reasonable time not to exceed one year in certain categories, including that of 60(b)(1), "excusable neglect".
>
> When relief from judgment is sought after the thirty day period allowed by Rule 4(a)(5), the applicability of the Rule 60(b)(1) excusable neglect standard may be questioned as being counter to the policy indicated by Rule 4(a)(5)'s time limitation. A motion for relief, however, cannot be filed within sixty days if a party has no knowledge of entry of judgment. Rule 4(a) is

> applicable in many situations where a party has timely notice of the judgment as well as in cases where notice is received within the next thirty days. In such cases it is possible to file a motion within the period provided by Rule 4(a). We hold that Rule 60(b) is available in situations where the excusable neglect does not arise until after the sixty day period."

After so holding, the Court established the standard to be met by an appellant under Rule 60(b). The Court stated:

> "Specifically we hold that in determining whether Rule 60(b) is applicable a court should consider (1) absence of Rule 77(d) notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision.

The *Rodgers* Court finally considered the specific facts of that case and found that the District Court had not abused its discretion and refused to dismiss the appeal, determining that appellant's counsel had, under the "totality of circumstances", exercised "due diligence" or satisfactorily explained the lack thereof.

Applying the four-part *Rodgers* test to this case should yield the same result. Here there (1) was an admitted absence of Rule 77(d) notice by the Clerk to Appellants and to at least one counsel for affected Defendants; (2) there has been no showing of prejudice to the Appellees in any fashion; (3) there was the prompt entry of an ex parte order by the District Court before a Motion for Rule 60(b) relief could be filed; and (4) there has been

"due diligence" by Appellants' counsel in this action, as demonstrated by the Affidavit of John C. Lynn filed herewith. Gunnell and Schvaneveldt argue that they received notice of the Judgment and that, in some unexplained manner, that fact negates part (1) of the above test. See Appellees' Memorandum, pp. 10 and 12. However, a requirement that all counsel must have failed to receive notice via error of the Clerk is not a part of the *Rodgers* test and flies in the face of sound judicial policy. To adopt this rule would require an automatic denial of any Rule 60(b) motion filed by a misled and diligent appellant who simply had the misfortune to be one of, or the only party, not to have received notice. The holding in *Rodgers* by its very terms precludes such a rule. In *Zurich Insurance Company v. Wheeler,* 838 F.2d 338, 340 (9th Cir. 1988), it appears that only the appellant failed to receive notice but the trial court nevertheless granted a motion to vacate and reenter judgment which was affirmed by this Court on appeal. See also *Kramer v. American Postal Workers Union, AFL-CIO,* 556 F.2d 929, 930 (9th Cir. 1977).

Zurich is also instructive in relation to these Appellees' argument that in some manner they have suffered prejudice by the Court's Order. In these consolidated cases it was clear from as early as January 29, 1990 that Plaintiffs sought certification of the Court's ruling of January 19, 1990 as a final judgment for the express purpose of the appeal of the Court's ruling granting various Defendants', including these Appellees, Summary Judgment on immunity grounds. See Motion for Reconsideration and Motion to Certify, Exhibits 5 and 6 in Appellants' Notice of Filing. As noted in *Zurich*:

> "There was no prejudice to the insurer, especially as the trial judge had indicated at the hearing on the motion for new trial his expectation that an appeal would be taken."
>
> 838 F.2d at 338, 340

Even more certainly in this case the Appellees knew that an appeal would be taken if, and as soon as the Court entered an order adverse to the Mixons on their Rule 59(e) Motion to Amend. Such an appeal would have been perfected promptly but for the manner and circumstances in which the Court's October 31, 1990 Decision and Judgment, it was entered and the failure of notice to Appellants' counsel.

These Appellees further assert that they are prejudiced by the potential loss of an opportunity to cross appeal because of the inadequacy of the content of the Notice of Appeal and hence the second test of *Rodgers* is not met. This argument must fail for several reasons. First, the Notice of Appeal clearly advises that the Mixons were appealing from the final ruling on their Motion to Amend which was directed solely and exclusively at the dismissal of the Defendants, including Gunnell and Schvaneveldt, who were the subject of all preceding Motions in this case. As counsel for the Appellees admits, he received the Notice of Appeal. Secondly, there is absolutely no reason that counsel for these Appellees could not have perfected a cross appeal or initiated their own appeal from any rulings by the District Court. Third, these Appellees may still have an opportunity to appeal at some future date dependent upon the ultimate disposition of this case on the merits as

to all parties. This argument of prejudice is a mere wishful stretching by Appellees in order to evade the holding in *Rodgers*.

Gunnell and Schvaneveldt finally raise two additional questions in relation to the timeliness of this appeal. First, they assert that that District Court's sua sponte Order of January 9, 1991 was erroneously entered because Appellants had filed no motion seeking relief from the Judgment. Secondarily, they advance the argument that an extension of time to appeal under Rule 4(a)(5), F.R.A.P. cannot extend the time beyond ten days from the entry of said Order. Both arguments are erroneous.

Initially the Court acted on January 9, 1991 to correct immediately an error it discovered on that date. Counsel for the Mixons and Farmers Insurance Company had no knowledge of the entry of the October 31, 1990 Judgment prior to that time. In fact, it was only via the Court's direct contact with counsel for the Mixons that notice of the entry of the Judgment was first acquired. Before any motion could be prepared and filed, the Court entered its Order on the same day and forwarded the same to all counsel. It is interesting to note that these presently protesting Appellees raised no objection to the Order when it was entered, filed no motion requesting reconsideration or review of the Order at any time and did not demand a hearing before the Trial Court on the issues raised by their Motion in this Appeal. See Clerk's Certificate of Record, Exhibit 1 to Notice of Filing, CR 379 to 408. In such circumstances, these Appellees should be precluded from raising these issues for the first time on this appeal. While the Trial Court recites reliance on Rule 60(a),

F.R.C.P. and Rule 4(a)(5), F.R.A.P. to correct the Clerk's omission rather than Rule 60(b), it is clear that the Court also made the necessary findings of good cause and due diligence by Plaintiffs' counsel in all aspects of the case sufficient to warrant the ordered relief under Rule 60(b).

In light of the Trial Court's findings, the claim that the District Court erred in entering its Order must be reviewed on a clearly erroneous abuse of discretion standard of review. See *Rodgers v. Watt*, supra, at 460:

> "We apply an abuse of discretion standard of review to an order granting a motion under Fed.R.Civ.P. 60(b)(1), because determination of excusable neglect is left to the sound discretion of the district court. *United States v. Russell*, 578 F.2d 806, 807 (9th Cir. 1978) (per curiam); *Savarese v. Edrick Transfer and Storage, Inc.*, 513 F.2d 140, 146 (9th Cir. 1975).

Applying such a standard in this case meets the test set forth in *Rodgers*. Here the Court found the absence of Rule 77(d) notice and the necessary diligence on the part of Appellants' counsel. If Gunnell and Schvaneveldt truly desired to claim some prejudice or object to the Court's sua sponte Order without a motion, they should have done so in the Trial Court.

The final argument of Gunnell and Schvaneveldt that the Court's Order could not grant more than ten days in which to appeal under Rule 4(a)(5), F.R.A.P. is inapplicable in this case. While the Trial Court referenced this excusable neglect rule in its Order, it is also clear that the Court relied upon Rule 60, F.R.C.P. to enter its determination. As noted in *Rodgers*, Rule 4(a)(5) is inapplicable in cases where the judgment appealed from was entered

more than sixty days before a motion for relief is filed. Hence, relief is properly available under Rule 60 and such Rule does not contain the ten day time limit set out in Rule 4(a)(5). Indeed, in both *Rodgers* and *Zurich*, supra, appeals were filed more than ten days after the entry of orders under Rule 60. This argument as well as all other advanaced by these Appellees should fail.

III

CONCLUSION

Appellants respectfully submit that the Motion to Dismiss Appeal should be denied and the appeal considered on the merits.

Respectfully submitted this 31st day of May, 1991.

LYNN, SCOTT, HACKNEY & JACKSON

By: /s/ John C. Lynn
JOHN C. LYNN
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing document was served, by depositing the same in the United States Mail, Postage prepaid, on this 31 day of May, 1991, to:

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